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In The

Supreme Court of the United States

October Term, 1984

LINDA FLEISHMAN,

Petitioner,

vs.

ELI LILLY AND COMPANY, E.R. SQUIBB & SONS, WINTHROP LABORATORIES and THE UPJOHN COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

1. Where petitioner's mother was administered DES during her pregnancy before petitioner's birth in 1955, and the petitioner developed cancer 23 years after her birth, in 1978, and brought suit against four manufacturers of the drug in 1979, do the equal protection and due process provisions of the Fourteenth Amendment to the Constitution of the United States permit the petitioner to be barred from access to the courts under color of the statute of limitations, despite the fact that such a result would mean that petitioner was, as a practical matter, never in a position to institute her action?

LIST OF PARTIES

The parties appearing in the litigation at the New York Court of Appeals level are all identified in the caption of this petition with the exception of those parties to a second case which was consolidated for purposes of appeal only. The parties to the second case were Carolyn Manno and Samuel Manno, plaintiffs-appellants, and Gerald Levi, M.D., and Eli Lilly & Company, defendants-respondents.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner, Linda Fleishman, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on June 12, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, County of Queens, on respondents' motion and cross-motions for summary judgment on the ground that the action is barred by the statute of limitations is printed in the Appendix and has not been reported officially or unofficially. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, printed in the Appendix, is reported in 96 A.D. 2d 825, 465 N.Y.S. 2d 735. The opinion of the Court of Appeals of the State of New York, printed in the Appendix, is reported in 62 N.Y. 2d 888, 478 N.Y.S. 2d 853. No opinion was rendered by the Court of Appeals of the State of New York on either petitioner's motion for reargument or her motion to amend the remittitur. The court's memorandum decisions with respect to such motions have not yet been reported officially or unofficially, but both are printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated June 12, 1984. Petitioner's motion for reargument, duly filed, was denied by an order dated September 6, 1984. Petitioner's motion to amend the remittitur duly filed, was granted by an order dated November 15, 1984, which requested return of the remittitur so that it might be amended by adding thereto the following:

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether plaintiff was deprived of due process and equal protection of the laws by the holding that plaintiff's causes of action accrued and the Statute of Limitations commenced to run upon exposure to the harmful drug. (See 62 NY2d 888.)"

A search of the court records performed on November 27, 1984 indicated that the remittitur had been forwarded for amendment by the Queens County Clerk to the Clerk of the Court of Appeals and the amended remittitur had not been returned.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part:

> "No state. . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition is brought by a young woman who in March of 1978 at the age of 23, discovered that she had developed cancer because her mother, during her pregnancy, had taken a drug known as Diethylstilbestrol ("DES").[1] Shortly thereafter, she was

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1. A full recitation of the facts concerning the marketing and lack of testing of DES by the companies producing the drug is set forth in *Bichler v. Eli Lilly and Co.*, 79 A.D. 2d 317, 436 N.Y.S. 2d 625 (1st Dept. 1981), *aff'd.*, 55 N.Y. 2d 317, 450 N.Y.S. 2d 776 (1982). The drug was administered to pregnant women to prevent miscarriages. It was eventually discovered that DES significantly increased the danger of certain types of cancer developing in the fetus after it had reached maturity. The companies totally failed to perform any tests on the drug's effects on the fetus, either in humans or in animals, although DES was specifically aimed at the placenta and fetus. When the drug's danger subsequently became known to them, the companies embarked on a shameful course of concealment of those dangers in an effort to keep the general public from learning of them.

forced to undergo a complete hysterectomy. This products liability action was instituted by petitioner, who knew nothing of her condition, or even that her mother had taken DES, prior to March, 1978, less than two years later in the Supreme Court of the State of New York, Queens County. The respondents are all pharmaceutical companies who manufactured and marketed DES.

There are many DES daughters, who like this petitioner have suffered tragic and debilitating injuries years after their mothers were administered the drug. As the result of a cruel and shocking injustice, however, most of these injured women in New York have found the door to the courthouse slammed shut before them, as they try to seek legal redress for their injuries against the drug companies who manufactured the drug responsible for those injuries.

The barrier to the legal relief they seek comes in the form of a misapplication of the statute of limitations which tells them that their actions are time-barred because their causes of action accrued at the time that their mothers first ingested the drug, long before there was any injury to them. At the same time, however, the New York courts have also told them that they may not sue the drug companies *before* their injuries occur, because in the absence of injury there is no present cause of action. Thus, a situation has been created where an injured DES daughter may sue neither before nor after her injury arises, and has thus been denied access to the courts in clear contravention of the due process and equal protection provisions of the Fourteenth Amendment.

On June 9, 1981, after sixteen months at issue and after pre-trial proceedings, including several depositions, had been concluded, respondent Upjohn moved for summary judgment upon the ground that the action was barred by the applicable statute of limitations. The motion was followed by cross-motions to dismiss the complaint or for summary judgment by respondents Lilly, Squibb and Winthrop, on the same grounds.

By memorandum decision dated December 10, 1981 Justice Edwin Kassoff granted the motion and cross-motions. The court stated that despite "the inequities which befall a plaintiff who is left without a remedy prior to the knowledge of any injuries" it interpreted the Court of Appeals' decision in *Thornton v. Roosevelt Hospital*, 47 N.Y. 2d 780, 417 N.Y.S. 2d 920 (1979) as mandating such a result.

An appeal was heard by the Appellate Division, Second Department, which by order and memorandum decision dated August 1, 1983, affirmed the judgment of the lower court, without opinion. Justice Gibbons dissented, arguing eloquently and forcefully that since the drug was administered not to the petitioner, but to her mother, a fact question existed as to whether the unborn child being carried by the mother was injured at the time the drug was administered or later, precluding summary disposition of the case.

An appeal was taken to the Court of Appeals, which by order and brief memorandum decision dated June 12, 1984 affirmed the judgment. Chief Judge Cooke dissented, stating:

> "A grave injustice — to victims of DES as well as to past and future victims of identified and unidentified substances which do not immediately make known their harmful effect upon the body but have a 'time-bomb' effect — is worked by the current rule of law which requires negligence and products liability causes of action to be brought before a plaintiff could reasonably know of their existence and very likely before any medically cognizable injury has occurred. It is time to abandon that inequitable rule as a mistake of the past that we have a duty to correct (see *Woods v. Lancet*, 303 NY 349, 354-355, *supra*). The

> current rule is unreasonable and the statute of limitations should not be construed in such a manner (see *Urie v. Thompson*, 337 US 163, 168-171; *Thornton v. Roosevelt Hospital*, 47 NY2d 780, 783-785, *supra* [Fuchsberg, J., dissenting]; *Schwartz v. Heyden Newport Chem. Corp.*, 12 NY2d 212, 219-220, *supra* [Desmond, Ch. J., dissenting]; *Heath v. Sears, Roebuck & Co.*, 464 A2d 288, 295)."

Petitioner's motion for reargument was denied by the Court of Appeals by order dated September 6, 1984.

It should be noted that the federal issues were first presented to Special Term in petitioner's memorandum of law, and were thereafter raised again in petitioner's briefs before both the Appellate Division and the Court of Appeals. In view of the fact that none of these courts specifically mentioned these issues in their decisions, petitioner moved in the Court of Appeals to amend the remittitur to reflect the fact that the court had indeed passed upon constitutional questions. This motion was granted by order dated November 15, 1984.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of the State of New York should be reviewed because it erroneously decided an important question of federal constitutional law which has not yet been settled by this Court, viz: the extent to which the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution limit a state's power to deprive a claimant of a personal injury cause of action on the ground of the running of the period of limitation despite the fact that injury does not occur until years after initial exposure to the offending drug.

I.

Where the injury sustained by petitioner did not occur until years after ingestion by her mother of the offending drug the application of the period of limitation to bar her action before that injury occurred is so unreasonable as to constitute a denial of due process and equal protection.

It is well established that all statutes of limitations must proceed on the idea that the injured party has had full opportunity afforded him to try his right in the courts.

Indeed, the guarantee of effective access to the courts has been expressly declared by this Court to be a federal constitutional right, *Bounds v. Smith,* 430 U.S. 817, 97 S. Ct. 1491 (1977), and that right has been recognized by federal district courts, *see, e.g., Hilliard v. Scully,* 537 F. Supp. 1084 (S.D.N.Y. 1982); *Spock v. United States,* 464 F. Supp. 510 (S.D.N.Y. 1978).

A statute of limitations may not bar this guarantee of effective access to the courts; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. 2 Cooley, *Constitutional Limitations,* page 764 (8th ed. 1927).

As this Court stated in *Wheeler v. Jackson,* 137 U.S. 245, 255, 258 (1890):

> "It is the settled doctrine of this court that the Legislature may prescribe a limitation for the bringing of suits . . . provided in each case, a reasonable time, taking all the circumstances into consideration be given . . . for the commencement of suit before the bar takes effect.

* * * *

> A Statute of Limitation cannot be said . . . to deprive one of property without due process of law, unless . . . it unreasonably limits the opportunity to enforce that right by suit."

It is petitioner's contention that in order for the operation of a statute of limitations to meet the constitutional criterion of reasonableness, the injured claimant must have had at very least an opportunity to discover the fact that he had actually been injured. Surely it is unreasonable for purposes of the due process clause to hold that the period of limitations has run in a case like the instant case where no injury occurred to petitioner until more than 23 years after her birth.

The instant case presents to this Court the opportunity to determine to what extent the constitutional requirement of reasonableness applies to a state determination of time of accrual of a cause of action and whether such requirement is not met where the period of limitations commences at a time when injury has not yet occurred and consequently the fact of injury was unknowable. As shown immediately below, past decisions have frequently found that the cause of action commences upon discovery or discoverability. These decisions were based upon a fundamental sense of justice and fairness. That this sense of justice and fairness is also a constitutional requirement of due process is petitioner's contention herein.

In the leading case of *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949), this Court was faced with the problem of establishing when the period of limitations commenced to run where the injured plaintiff had contracted silicosis, a slow growing, progressively worsening disease. The plaintiff there had been exposed to silica dust since 1910. The action was filed on November 21, 1941, within three years after the plaintiff had discovered that he had silicosis. The Court held that the period of limitations

commenced to run when the injured plaintiff discovered that he had silicosis. The Court after a thorough analysis, unequivocally rejected the argument that the limitations period should commence from the date the injured plaintiff started to breathe in the silica dust. The Court emphasized the unknown and inherently unknowable nature of the injuries sustained. It stated that if plaintiff was to be barred by the statute of limitations (at 337 U.S. 169):

> "It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs, under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability."

The Court specifically placed its decision within the salutory purpose of a limitation statute, stating at page 170:

> "Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at an earlier date."

To the same effect, it was held in *Riccuiti v. Voltarc Tubes, Inc.*, 277 F. 2d 809 (2d Cir. 1960), that the statute of limitations

began to run when the plaintiff's disease was diagnosed, the court stating, in language directly applicable to the facts in the case at bar, at page 813:

> "We think it unreasonable to hold that the statute of limitations begins to run against an injured person at a time when he does not in fact know, and could not with the exercise of reasonable care and diligence know, what his injury is. To so hold would nullify any right to recover for many serious but slowly and insidiously developing diseases. We hold, therefore, that in this case the statute of limitations began to run on January 27, 1956, the date on which the plaintiff's disease was diagnosed, unless the defendant can show that the plaintiff should, in the exercise of reasonable diligence, have earlier discovered the nature of his disease."

The sound reasoning of the foregoing authorities has been followed by no less than thirty states which have held that the limitations period in injuries which are unknowable and undetectable, such as in the case at bar, begins to run from the date of discovery of the injury.[2]

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2. Arizona [*Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F. 2d 100 (9th Cir. 1979)]; Arkansas [*Schenebeck v. Sterling Drug, Inc.*, 291 F. Supp. 368 (E.D. Ark. 1968), *aff'd.*, 423 F. 2d 919 (8th Cir. 1970)]; California [*Velasquez v. Fibreboard Paper Products Corporation*, 97 Cal. App. 3d 881 (1979)]; Colorado (Revised Statutes §13-80-127.5); Connecticut (General Statutes §52-577a); Delaware [*Rudginski v. Pullella*, 378 A. 2d 646 (Del. Super. 1977)]; Florida [*Perez v. Universal Engineering Corp.*, 413 So. 2d 75 (Fla. App. 1982)]; Georgia [*King v. Seitzingers, Inc.*, 287 S.E. 2d 252 (Ga. App. 1981)]; Hawaii (*Agustin v. Dan Ostrow Construction Co.*, 636 P. 2d 1348 (Hawaii Supr. 1981)]; Illinois [*Needham v. White Laboratories, Inc.*, 639 F. 2d 394 (7th Cir. 1981),

(Cont'd)

Rather than following such authorities, however, the New York courts have continued to adhere to a doctrine expressed in such cases as *Thornton v. Roosevelt Hospital*, 47 N.Y. 2d 780, 417 N.Y.S. 2d 920 (1979), to the effect that the statute of limitations accrues at the date of ingestion of a drug which causes harm rather than when that harm is first discovered. The courts continually express their sympathy for the injured plaintiff who is barred from bringing an action before he ever knew that a cause of action existed, but erroneously state that it is for the Legislature to correct such abuses, despite the fact that the courts have been determining the date of accrual in statute of limitations cases for many years (*see e.g., Flanagan v. Mt. Eden General Hospital*, 24 N.Y. 2d 427, 301 N.Y.S. 2d 23 [1969], holding that the statute

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(Cont'd)

cert. denied, 454 U.S. 927 (1981)]; Indiana (Code §34-4-20A-5); Kansas [*Sterling Drug, Inc. v. Cornish*, 370 F. 2d 82 (8th Cir. 1966)]; Kentucky [*Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W. 2d 497 (Ky. Super. 1979)]; Louisiana [*R.J. Reynolds Tobacco Co. v. Hudson*, 314 F. 2d 776 (5th Cir. 1963)]; Maine [*Williams v. Ford Motor Co.*, 343 A. 2d 712 (Me. Super. 1975)]; Maryland [*Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A. 2d 299 (1978)]; Minnesota [*Karjala v. Johns-Manville Products Corp.*, 523 F. 2d 155 (8th Cir. 1975)]; Missouri [V.A.M.S. §516.100; *Renfroe v. Eli Lilly & Co.*, 541 F. Supp. 805 (E.D. Mo. 1982)]; New Hampshire [*Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 371 A. 2d 170 (1977)]; New Jersey [*Lopez v. Swyer*, 62 N.J. 267, 300 A. 2d 563 (1973)]; North Carolina [North Carolina G.S. §1-15(b)]; Ohio [*Brush Beryllium Co. v. Meckley*, 284 F. 2d 797 (6th Cir. 1960)]; Oklahoma [*Williams v. Borden Inc.*, 637 F. 2d 732 (10th Cir. 1981)]; Pennsylvania [*Anthony v. Koppers Co., Inc.*, 436 A. 2d 181 (Pa. 1981) (discovery rule not applicable in wrongful death action)]; South Carolina (Code of Laws of South Carolina, 15-3-535); Tennessee [*McCroskey v. Bryant Air Conditioning Co.*, 524 S.W. 2d 487 (Tenn. 1975)]; Texas [*Borel v. Fibreboard Paper Products Corp.*, 493 F. 2d 1076 (5th Cir. 1973), *cert. denied*, 919 U.S. 869 (1974)]; Vermont [Vermont Stat. Ann. T. 12 §512 (Supp. 1983)]; Washington [*U.S. Oil & Refining Co. v. Washington Dep't of Ecology*, 633 P.2d 1329 (Wash. 1981)]; West Virginia [*Pauley v. Combustion Engineering, Inc.*, 528 F. Supp. 759 (1981)]; and Wyoming [*Duke v. Housen*, 589 P. 2d 334 (Wyo. 1979), *cert. denied*, 444 U.S. 363 (1979)].

of limitations in foreign object medical malpractice cases accrues at the date of discovery).

The basic unfairness of the *Thornton* doctrine, which operates to deprive an injured plaintiff of his or her day in court before there is any awareness of an injury, rises to new and undreamed-of heights in the DES cases. The holding in *Rheingold v. Squibb*, 74 Civ. 3420 (S.D.N.Y. 1975) underscores this unfairness.

In *Rheingold*, a DES daughter brought suit seeking to create a fund for other DES daughters, so as to provide research and treatment. The defendant there argued that the plaintiff had not yet been injured, and therefore, could not be a class representative.

The court stated:

> "The Court is satisfied that had plaintiff's daughter contracted cancer or any other damaging condition attributable to her mother's ingestion of DES, an action in strict product liability would lie under New York law and could be instituted within three years following the 'injury'. *Rivera v. Berkeley Super Wash, Inc.*, 44 A.D. 2d 316, *aff'd.* 37 N.Y.2d 395.
>
> The New York courts have uniformly held that injury and damage are essential to recovery in tort. *Carnival Company v. Metro-Goldwyn-Mayer, Inc.*, 23 A.D.2d 75; *Metromedia, Inc. v. Mandel*, 21 A.D.2d 219, *aff'd.* 15 N.Y.2d 616. The fact that plaintiff's daughter may suffer injury in the future does not satisfy the present requirement of injury or damage, nor does the fact that those persons whom she seeks to represent *may* suffer injury in the future create a present cause of action in them."

See also, Morrissy v. Eli Lilly & Company, 76 Ill. App. 3d 753, 32 Ill. Dec. 30, 394 N.E. 2d 1369 (1979) to the same effect.

Thus, if a DES plaintiff institutes her action before her injury arises, the action will be dismissed by virtue of the *Rheingold* decision. On the other hand, if she waits until after the injury occurs to bring suit, she will be barred on the basis of the statute of limitations. This places her in an impossible position in which redress in the courts will be foreclosed no matter what she does.

As Judge Frank stated in his dissenting opinion in *Dincher v. Marlin Firearms Co.*, 198 F. 2d 821, 823 (2d Cir. 1952), in which he condemned the "Alice in Wonderland" effect of such a result:

> "Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical 'axiom', that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to a plaintiff."

If a DES daughter is rendered powerless to seek redress from negligent manufacturers such a situation offends common sense, justice and the due process guarantee of the Fourteenth Amendment.

It has long been recognized that "nothing could be more unreasonable or more certainly violative of constitutional prohibitions than to bar rights of action because of the lapse of

time prior to their accrual, when they would have been exercised." *Lamp v. Powder River Live Stock Co.*, 132 F. 434 (8th Cir. 1904); *see Wilson v. Iseminger,* 185 U.S. 55, 62, 22 S. Ct. 573, 575 (1902).

The purpose of a statute of limitations is to require plaintiffs diligently to pursue their rights, so that defendants will receive notice as soon as practicable of claims being made against them. *See, e.g., Urie v. Thompson, supra; Romano v. Westinghouse Co.*, 114 R.I. 451, 336 A. 2d 555, 560 (1975). But, "a person cannot be said to have been 'sleeping on his rights' when he does not know he had such rights," *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 170, 371 A. 2d 1970 (1977); *see also, Harig v. Johns-Manville Products Corp.*, 284 Md. 70, 394 A. 2d 299, 303 (1978). As a number of courts and commentators have pointed out, cutoffs which purport to be statutes of limitations, are actually *substantive* grants of immunity to defendants, since they completely destroy for certain plaintiffs any possible right of action for compensation for certain injuries. To effect such a substantive alteration of plaintiffs' rights under the guise of a statute has been held to be impermissible throughout the country, *Muzar v. Metro Town Houses, Inc.*, 82 Mich. App. 368, 266 N.W. 2d 850, 857 (1978); *Bagby Elevator & Electric Co. v. McBride,* 291 So. 2d 206, 309 (Ala. 1974); *Kallas Millwork Corporation v. Square D. Co.*, 66 Wis. 2d 382, 225 N.W. 2d 454, 467 (1975); *see* Louis N. Masserty, *Date of Sale Statutes of Limitations—A New Immunity for Product Suppliers,* 1977 Insur. Law J. 535, 541 (Sept. 1977).

Furthermore, such a statute of limitations contradicts the basic purpose of tort law: compensation, deterrence and cost-spreading. The thrust of product liability law as it has developed is to enable consumers who are at the mercy of the impersonal forces of the modern mass market to recover for injuries caused by defective products placed in the stream of commerce. To cut off that potential right of recovery, not because of any doubt about the manufacturer's culpability or the plaintiff's consequent harm, but

merely because of the passage of an arbitrary number of years conflicts with every reasonable interpretation of the purposes of products liability litigation, or of the place of a statute of limitations in a just and orderly scheme of law.

As one court stated:

> "The 'repose' of the manufacturer must give way to the welfare of the consuming public, and if this means liability in *perpetuity,* so be it. Products containing defects when manufactured which remain undetected, are veritable time bombs ready to explode in the face of the hapless consumer at any time. Manufacturers cannot escape their responsibility for creating such dangers by invoking statutes of limitations designed for contract cases. . . 'In considering the relative hardships we must not lose sight of the crucial fact that [the defendant] originally placed the allegedly defective product in the stream of trade. As manufacturer and distributor it is the one best suited to protect against consequential damage as a business risk of distribution, whereas the injured parties are wholly innocent and largely incapable of protecting themselves.' " *Nelson v. Volkswagen of America, Inc.*, 315 F. Supp. 1120, 1122 (D.N.H. 1970), quoting *Rosehall v. New Brunswick,* 51 N.J. 130, 238 A. 2d 169, 176 (1968) (emphasis in original).

See also, Nolan v. Johns-Manville Asbestos and Magnesia Material Corp., 74 Ill. App. 3d 778, 30 Ill. Dec. 307, 392 N.E. 2d 1352 (1979).

The deterrence aspect of product liability litigation — which is perhaps ultimately of even greater social importance than the

compensation of individual injured victims — serves to encourage manufacturers to design and produce safer and more durable products. But if the law tells the manufacturer that it is absolved of responsibility to a person seeking recovery for an injury caused by its product, it is encouraging not safety or prudent planning, but a disregard for the consequences of its actions. Drug companies should expect that the effects of their products will not become apparent for years, *Raymond v. Eli Lilly & Co., supra.*

It seems absurd that a plaintiff who had the "good fortune" to get ill quickly may obtain compensation, while a plaintiff whose cancer takes a number of years to manifest itself can turn to the courts for redress of her injuries in vain. It is tragic that more than 30 years after this Court declared in *Urie v. Thompson, supra,* that it could not believe that a "humane legislative plan intended such consequences to attach a blameless ignorance", we should be in court arguing about the validity of precisely such an inhumane result.

Moreover, the misapplication of the statute of limitations to bar petitioner from the courts in this case is violative of the letter and spirit of the concept of equal protection.

Any decision or statute which singles out one class of persons for either special burdens or special privileges denies equal protection of the laws to which all are entitled under the Fourteenth Amendment.

The rule barring petitioner from suing herein discriminates between the woman who has the "good fortune" to have her injuries occur earlier, and the woman whose injuries occur later. If a DES mother has twin daughters, one who develops cancer at the age of 18 and the other who develops the disease at the age of 22, the younger daughter can sue, while the older daughter is forever barred from bringing her action. Where is the justice or logic in such a result?

The arbitrary and irrational denial of petitioner's rights inherent in the decisions below will operate not to evenhandedly restrict the rights of all products liability plaintiffs to recover for their injuries, nor will it evenhandedly provide *all* manufacturers with immunity from suit. Instead it will operate in a way which insidiously selects a certain class of plaintiffs as those who shall lose their rights, and a certain class of manufacturers, as those who shall be sheltered from suit based upon totally arbitrary grounds, fast or slow injury. As arbitrarily as in a lottery, if a plaintiff is injured by a chemical rather than by any other defective product, that plaintiff cannot sue if his injury does not occur until some years after the introduction of the chemical into his system. This arbitrary splitting of the classes of plaintiffs and defendants into two groups with radically different rights violates the constitutional guarantee of equal protection of the laws.

To distinguish between a toaster manufacturer who will be held liable for injuries resulting from his product from the *time of injury* and a drug manufacturer whose liability will have terminated at the time of such injury, has no logic. Nor is there any rational basis for distinguishing between this petitioner who was injured in 1978, and a plaintiff injured by any other defective untested product.

Consider, for example, the user of a toaster manufactured in 1965. If an injury is sustained in 1978, under the New York case of *Victorson v. Bock Laundry Co.*, 37 N.Y. 2d 395, 373 N.Y.S. 2d 39 (1975), he would have three years from the date of the injury to bring suit. On the other hand, our petitioner suffers injury in 1978, based upon a drug that is administered not to her, but to her mother, before petitioner is even born, and she cannot recover. The distinction defies logic and common sense. It is fundamentally unfair.

It is therefore submitted that petitioner should be given her day in court to present proof showing that in fact no injury was

sustained by her until March, 1978. Only in this way will it be possible to apply the appropriate period of limitation in a manner consonant with the basic concepts of due process and equal protection — "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana,* 272 U.S. 312, 47 S. Ct. 103 (1926).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED S. JULIEN
JULIEN & SCHLESINGER, P.C.,
Attorneys for Petitioner

WILLIAM D. FIREMAN
Of Counsel

APPENDIX

OPINION AND DISSENTING OPINION OF COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK

COURT OF APPEALS

2 No. 301

Linda Fleishman,

Appellant,

v.

Eli Lilly and Company, et al.,

Respondents.

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2 No. 302

Carolyn Manno et al.,

Appellants,

v.

Gerard Levi, M.D. et al.,

Respondents.

(301) Alfred S. Julien & William D. Fireman, NYC, for appellant.

Opinion

Russell H. Beatie, Jr. & Sanford N. Berland, NYC, for respondent Lilly. Charles M. McCaghey, Terence J. O'Rourke & Grace M. Healy, NYC, for respondent Squibb. Nancy Leda Guren, John J. Bower & Leah G. Kaplan, NYC, for Upjohn. Robert J. Woody & Thomas C. Rice, NYC, for Winthrop.

(302) Harvey W. Spizz, Mineola, for appellant.

Russell H. Beatie, Jr., NYC, for respondent Eli. Kenneth Mauro, NYC, for respondent Levi

MEMORANDUM:

The order of the Appellate Division in each case should be affirmed, with costs.

There is no showing in the record in either case of sufficient legal significance to warrant departure from our prior decisions. (*Steinhardt v Johns-Manville Corp.*, 54 NY2d 1008, remittitur amd 55 NY2d 802, app dsmd, cert den 456 US 967; *Thornton v Roosevelt Hosp.*, 47 NY2d 780; *Schwartz v Hayden Newport Chem. Corp.*, 12 NY2d 212, remittitur amd 12 NY2d 1073, cert den 374 US 808; *Schmidt v Merchants Dispatch Transp. Co.*, 270 NY 287, reh den 271 NY 531.) We most recently reaffirmed our adherence to these decisions in *Martin v Edwards Labs.* (60 NY2d 417, 425-426.) Any departure from the policies underlying these well-established precedents is a matter for the Legislature and not the courts.

COOKE, Ch. J. (dissenting):

Admittedly, the injuries in this case are essentially no different than the injuries suffered because of the delayed or slow action

of inhaled asbestos (*Matter of Steinhardt v Johns-Manville Corp.*, 54 NY2d 1008, app dsmd 456 US 987; *Schmidt v Merchants Desp. Transp. Co.*, 270 NY 287), or cancer-causing drug injections (*Thornton v Roosevelt Hosp.*, 47 NY2d 780; *Schwartz v Heyden Newport Chem. Corp.*, 12 NY2d 212, cert den 374 US 808). But, because I believe that the reliance on past precedent is no longer justified, I respectfully dissent.

It appears that the primary proffered rationale for continuing the rule that the causes of action accrue in the present cases upon contact with the cancer-causing agent is the doctrine of *stare decisis*. If this were a completely inflexible rule, I would acquiesce in the continuance of the result first enunciated in 1936 in *Schmidt v Merchants Desp. Transp. Co., supra*. However, the law is not and should not be so inflexible that it cannot correct itself from injustice and unfounded concerns espoused in prior decisions (see *Woods v Lancet*, 303 NY 349, 354-355). True, precedent is not to be abandoned lightly or without compelling circumstances, for it serves an important purpose of maintaining stability in the law (see *Cenven, Inc. v Bethelehem Steel Corp.*, 41 NY2d 842, 843; *Heyert v Orange & Rockland Utilities*, 17 NY2d 352, 360; Specher, 31 A.B.A.J. 501) and "it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next" (*People v Hobson*, 39 NY2d 479, 488). On the other hand, the doctrine should not be used as a shield behind which a court may hide as reason for perpetuating unnecessary and profound unfairness, which subjects the Law to ridicule.

> Tort cases, but especially personal injury cases, offer another example where courts will, if necessary, more readily reexamine established precedent to achieve the ends of justice in a more

> modern context (see, e.g., *Victorson v Bock Laundry Mach. Co.*, 37 NY2d 395; *Goldberg v Kollsman Instrument Corp.*, 12 NY2d 432; *Bing v Thunig*, 2 NY2d 656; *Woods v Lancet*, 303 NY 349). Significantly, in these cases the line of precedent, although well established, was found to be analytically unacceptable, and, more important, out of step with the times and the reasonable expectations of members of society.

(*People v Hobson*, 39 NY2d 479, 489, *supra*.)

A grave injustice — to victims of DES as well as to past and future victims of identified and unidentified substances which do not immediately make known their harmful effect upon the body but have a "time-bomb" effect — is worked by the current rule of law which requires negligence and products liability causes of actions to be brought before a plaintiff could reasonably know of their existence and very likely before any medically cognizable injury has occurred. It is time to abandon that inequitable rule as a mistake of the past that we have a duty to correct (see *Woods v Lancet*, 303 NY 349, 354-355, *supra*). The current rule is unreasonable and the statute of limitations should not be construed in such a manner (see *Urie v Thompson*, 337 US 163, 168-171; *Thornton v Roosevelt Hosp.*, 47 NY2d 780, 783-785, *supra* [Fuchsberg, J., dissenting]; *Schwartz v Heyden Newport Chem. Corp.*, 12 NY2d 212, 219-220, *supra* [Desmond, Ch. J., dissenting]; *Heath v Sears, Roebuck & Co.*, 464 A2d 288, 295).

It is not persuasive to say that any change is better left to the Legislature. That the determination of when a cause of action accrues is not solely a matter for the Legislature, is plainly evident by this court's determination here and previously, that a cause

of action of this type accrues upon injury which is assumed to occur at the time of exposure, ingestion or injection of the cancer-causing foreign substance (see, e.g., *Schwartz v Heyden Newport Chem. Corp.*, 12 NY2d 212, *supra; Schmidt v Merchants Desp. Transp. Co.*, 270 NY 287, *supra*). Indeed, when this court acted to change the common law by adopting a date-of-discovery rule for the commencement of foreign-object medical malpractice cases, it stated:

> Our decision does not encroach upon any legislative prerogatives. The Legislature did not provide that the Statute of Limitations should run from the time of the medical malpractice. This court did. Therefore, a determination that the time of accrual is the time of discovery is no more judicial legislation than was the original determination. Granted, the Legislature could have acted to change our rule; however, we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the Legislature has not seen fit to act.

(*Flanagan v Mt. Eden Gen. Hosp.*, 24 NY2d 427, 434; see *Woods v Lancet*, 303 NY 349, 354-356, *supra*).

As recently stated by this court:

> When limitations begin to run "depends on a nice balancing of policy considerations" (*Victorson v Bock Laundry Mach. Co.*, 37 NY2d, *supra*, at p 403) reflecting the manufacturer's interest in defending a claim before his ability to

> do so has deteriorated through passage of time, on the one hand, and, on the other, the injured person's interest in not being deprived of his claim before he has had a reasonable chance to assert it (*id. Caffaro v Trayna*, 35 NY2d 245, 250-252; *Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427, 429-431).

(*Martin v. Edwards Labs.*, 60 NY2d 417, 425.)

Here, the balance of policy considerations weighs heavily in favor of plaintiffs and indicates that a discovery rule or, at the very least, a true date of medical-injury rule should be adopted for the accrual of the causes of action.

A statute of limitations serves in part to prevent plaintiffs from sleeping on their rights or waiting to assert stale claims and to ensure that defendants will receive notice of claims as soon as practicable (see *Urie v Thompson*, 337 US 163, 170, *supra*). In these cases, the plaintiffs cannot be said to have purposefully or unreasonably waited to bring suit because no injuries were known by them to occur at the time of their ingestion of or exposure to DES (see *Raymond v Eli Lilly & Co.*, 117 NH 164, 170).

As to the deterioration of the ability to defend, this situation is functionally equivalent to defective products that are implanted without assimilation. In the latter situation, "the age of the claim and consequent problems of proof disadvantaged not only the manufacturer but also the plaintiff who to succeed had to prove that the defect existed at the time it left the manufacturer's plant" (*Martin v Edwards Labs.*, 60 NY2d 417, 427, *supra*). Indeed, in DES cases, because of the long passage of time until a suit is brought, the plaintiff will be severely disadvantaged in trying to

determine which drug company manufactured the product, and the availability of other theories of recovery has not yet been expressly determined (see *Bichler v Lilly & Co.*, 55 NY2d 571). Further, the fact that the product has assimilated into the body does not debilitate the defense, because the nature of the claim is not that the product "broke" but that its known and undisputed chemical composition at the time of ingestion was defective. Thus, examination of the actual product here, unlike a defective implanted product, is not crucial to the defense. Finally, prior DES cases have shown that much of the original testing information has been preserved by the chemical manufacturers (see *Bichler v Lilly & Co.*, 55 NY2d 571, *supra*).

Neither does credibility, nor the danger of feigned claims play a significant or greater role in DES cases than implant cases because it is quite impossible to feign the medically certifiable presence of cancer. In addition, similar to the implant cases, the fact that "complicated medical questions may be involved and professional diagnostic judgment implicated" (*Martin v Edwards Labs.*, 60 NY2d *supra* at p 427) does not require a date-of-ingestion rule, just as such considerations did not require a date-of-insertion rule in the implant cases, because the medical issues "normally will concern only recent events rather than remote implantation" (*id.*).

The function of the statute of limitations as a "device for repose," relied upon initially in *Schwartz v Heyden Newport Chem. Corp.* (12 NY2d 212, 218, *supra*), should not now be deemed to outweigh the plaintiff's equities. In *Schwartz*, the balance in favor of repose rested upon the presumptions that only "the interests of an occasional claimant were subordinate to society's interest in repose;" and that only in fraud actions "were there a sufficient number of *unknown* wrongs to justify a departure

from the general rule" as compared to "the *rarity* of such unfortunate cases in other types of actions" (*id.* [emphasis added]). It is now all too clear that long-delayed injuries resulting from ingestion of toxic drugs are no longer a "rarity."

These cases present a compelling argument for adopting a discovery rule. The plaintiff may not know of the exposure to DES or other potentially harmful pharmaceuticals, which presents a situation similar to the foreign-object medical malpractice cases where a discovery rule is utilized (see CPLR 214-a), or that such exposure may be harmful. With an implanted device, it is far more likely that the plaintiff will discover injury caused by a product failure within the statute of limitations, but with ingested medications, the plaintiff will often not learn of or suspect any injury until the cancer begins to manifest itself, which may be years after the present limitations period or even after the cancer cells began to form. This is especially true, when the drug was a teratogen and the plaintiff was *in utero*.

In sum, given the relatively equal deterioration in the ability to defend and prosecute, these types of "time-bomb" drug cases, and the strong societal interest in not depriving an injured person of his or her claim before it can reasonably be asserted, a discovery rule should be adopted in these cases. At the very least, adherence to the medical-date-of-injury rule, recently adopted in *Martin v Edwards Labs.* (60 NY2d 417, *supra*), should be continued in these types of cases. In *Martin*, the "delayed" injuries were suffered from a defective intra-uterine device, where the product itself did not malfunction but permitted bacteria to invade the uterus from the date of its insertion. This court held that plaintiff's time to sue did not begin to run until a pelvic infection began. No rational distinction can be drawn between that case and the present, where no medically cognizable injury may occur until sometime after the prescribed medication was taken.

Opinion

For all these reasons, the order of the Appellate Division should be reversed, and plaintiffs' complaints reinstated.

* * * * * * * * * * * * * * * * * * * *

In each case:

Order affirmed, with costs, in a memorandum. Judges Jasen, Jones, Wachtler and Simons concur. Chief Judge Cooke dissents and votes to reverse in an opinion. Judges Meyer and Kaye took no part.

Decided June 12, 1984

ORDER AND OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on August 1, 1983

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
HON. JAMES F. NIEHOFF,
Associate Justices.

Linda Fleishman,

Appellant,

v.

Eli Lilly and Company, et al.,

Respondent.

Order

In the above entitled action to recover damages for personal injuries, the above named Linda Fleishman, plaintiff, having appealed to this court from (1) an order of the Supreme Court, Queens County, dated January 22, 1982, which granted defendants motions and dismissed the complaint on the ground that it was time-barred, and (2) a judgment entered thereon on April 15, 1982; and the said appeals having been argued by Alfred S. Julien, Esq.,

Order

of counsel for appellant, argued by Thomas C. Marra, Esq., of counsel for respondent Eli Lilly and Company, argued by Charles M. McCaghey, Esq., of counsel for respondent E.R. Squibb & Sons, Inc., submitted by Robert J. Woody, Esq., of counsel for respondent Winthrop Laboratories and argued by Nancy Ledy Curren, Esq., of counsel for respondent The Upjohn Company, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the appeal from the order is hereby dismissed, without costs or disbursements. (See *Matter of Aho*, 39 NY2d 241, 248.), and it is further

ORDERED that the judgment appealed from is hereby affirmed, without costs or disbursements. (See *Manno v. Levi*, ____ AD2d ____ [2nd Dept, July 11, 1983].)

DAMIANI, J.P., MANGANO and NIEHOFF, JJ., concur.

GIBBONS, J., concurs insofar as the appeal from the order is dismissed, but otherwise dissents and votes to reverse the judgment and deny defendants' action to dismiss the complaint, in accordance with a memorandum contained in the said opinion and decision slip of the court herein dated August 1, 1983.

Enter:

s/ Irving N. Selkin
Clerk of the
Appellate Division

Order

VINCENT D. DAMIANI, J.P.
GUY J. MANGANO
DAVID T. GIBBONS
JAMES P. NIEHOFF, JJ.

___ AD2d ___ A - April 18, 1983

925 E
926 E Linda Fleishman, appellant, v. Eli Lilly and Company, et al., respondents.

Julien, Schlesinger & Finz, P.C., New York, N.Y. (Alfred S. Julien and William D. Fireman of counsel), for appellants.

Dewey, Ballantine, Bushby, Palmer & Wood, New York, N.Y. (Thomas C. Mazza and Sanford N. Berland of counsel), for respondent Eli Lilly and Company.

Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N.Y. (Charles M. McCaghey, Terrence J. O'Rourke and Leonard R. Ringle of counsel), for respondent E.R. Squibb & Sons, Inc.

Simpson Thacher & Bartlett, New York, N.Y. (Robert J. Woody and Thomas C. Rice of counsel), for respondent Winthrop Laboratories.

Bower & Gardner, New York, N.Y. (John J. Bower, Nancy Ledy Gurran and Leah G. Kaplan of counsel), for respondent The Upjohn Company.

In an action to recover damages for personal injuries, plaintiff appeals from (1) an order of the Supreme Court, Queens County

Order

(KASSOFF, J.), dated January 22, 1982, which granted defendants' motions and dismissed the complaint on the ground that it was time-barred, and (2) a judgment entered thereon on April 15, 1982.

Appeal from the order dismissed, without costs or disbursements. (See *Matter of Aho,* 39 NY2d 241, 248.)

Judgment affirmed, without costs or disbursements. (See *Manno v. Levi,* ____ AD2d ____ [2nd Dept, July 11, 1983].)

DAMIANI, J.P., MANGANO and NIEHOFF, JJ., concur.

GIBBONS, J., concurs insofar as the appeal from the order is dismissed, but otherwise dissents and votes to reverse the judgment and deny defendants' motions to dismiss the complaint, in accordance with the following memorandum:

Plaintiff was born on March 29, 1955. Almost exactly 23 years later, in March, 1978, she discoverd that she had cervical and vaginal cancer, which required radical surgery, including a complete hysterectomy. In January and February, 1980, plaintiff commenced suit against the four defendant drug companies, setting forth seven causes of action. According to the complaint, the cancer was caused by a drug named Diethylstilbestrol (hereinafter DES), a drug previously manufactured by defendants, which was ingested by plaintiff's mother when the latter was pregnant with plaintiff.

The sole issue on this appeal is whether plaintiff's suit was brought within the period provided by the applicable Statute of Limitations. This suit for personal injuries had to be commenced, unless a toll was in effect, within three years of its accrual (CPLR 214,

subd 5; CPLR 203, subd [a]). If the action accrued prior to September 1, 1974, the effective date of the law defining an infant as someone under 18 years of age (L 1974, ch 924), the Statute of Limitations would have been tolled until that date because of plaintiff's age (CPLR 208).

While the Legislature has set forth the various Statutes of Limitations, to be measured from the time a cause of action accrues to the time the claim is interposed (CPLR 203, subd [a]), it has been left to the courts to determine when a cause of action accrues (*Cubito v. Kreisberg,* 69 AD2d 738, 743, affd 51 NY2d 900). In general, it can be said that a cause of action for personal injuries, whether sounding in negligence, malpractice, or products liability, accrues at the time of injury (see, e.g., *Victorson v. Bock Laundry Mach. Co.,* 37 NY2d 395, *Cubito v. Kreisberg, supra*). "the issue to be decided, then, is when did the injury occur: at the time of insertion, at the time symptoms began to develop, at the time that plaintiff discovered her malady, or at some other time?" (*Reyes v. Bertocchi,* 92 AD2d 863, 864). Defendants, relying on *Schmidt v. The Merchants Desp. Transp. Co.* (270 NY 287), maintain that, as a matter of law, it must be found that plaintiff's injury occurred at the time that her mother ingested the DES.

Schmidt v. The Merchants Des. Transp. Co. (supra), and its progeny have recently been reviewed in a scholarly opinion by Justice NIEHOFF in the case of *Lindsey v. A.H. Robins Co.* (91 AD2d 150). These "inhalation-injection cases stand primarily for the proposition that when a harmful substance enters the body, or is taken internally, the injury occurs immediately. Those cases hold that it is the introduction of the deleterious substance into the body, through inhalation or injection, which constitutes the injury to a plaintiff and not the infection or disease which may ultimately be caused by the substance. In other words, the injection

or inhalation of the harmful substance into the body constitutes the actionable 'invasion of the body' which *immediately* initiates the infection or disease process for which a negligent defendant is responsible" (*Lindsey v. A. H. Robins Co., supra,* p 157). It does not necessarily follow from *Schmidt v. The Merchants Desp. Transp. Co. (supra),* however, that the injury to plaintiff occurred at the time her mother ingested DES. The drug was not administered to plaintiff but to her mother. While it might be argued that the mother was injured at the time she ingested DES (see *Manno v. Levi,* ____ AD2d ____ [2d Dept, July 11, 1983]), a fact question exists as to whether the unborn child being carried by the mother was injured at that time or later. I, therefore, dissent.

The Court of Appeals has said, following *Schmidt v. The Merchants Des. Transp. Co. (supra):* "We must assume that the [deleterious substance] immediately acted upon [the plaintiff's] tissue" *(Schwartz v. Heyden Newport Chem. Corp.,* 12 NY2d 212, 217). In this case, why must this be assumed? Modern science has demonstrated that the contrary is often the case. Some drugs and chemicals have no immediate deleterious effect on the body after they are ingested. DES is one such drug, causing vaginal carcinoma only after a latent period (see *Bichler v. Lilly & Co.,* 79 AD2d 317, 324, affd 55 NY2d 571). It is as though the DES had a time bomb affect on the body. A general rule that ingestion and injury are simultaneous ignores that fact that some drugs have no immediate effect on the body and is premised on an absolutist theory that represents a primitive scientific view. The question of when an injury occurs is empirical in nature. If the issue is problematic, as in this case, a trial or hearing, where expert testimony can be presented, is necessary to resolve the matter (*Lindsey v. A.H. Robins Co., supra*).

It is proposed that application of the principles enunciated in *Schmidt v. The Merchants Desp. Transp. Co. (supra),* to this case results in a finding that the Statute of Limitations period expired on September 1, 1977. Not only was this seven months prior to the time plaintiff discovered that she had cancer, it may very well have been before the cancer even existed! Prior to her battle with the disease, plaintiff was a lifeguard at a resort hotel, and an obviously healthy young woman. The record does not reveal whether, on September 1, 1977, modern science could have determined that she was afflicted with any malady or that cancer was about to strike; yet, on that date, according to the majority, she lost her right to ever bring suit. While the stale claim rationale of Statutes of Limitations is a sound one, in this case, it is inapplicable. It is sought here to declare the bread stale before it is baked. Realistically, the young woman could not have sued prior to September of 1977 because no injury had manifested itself, and, for all we know on the present record, did not, in fact, exist. Yet she could not bring suit after that date because, purportedly, the Statute of Limitations had run. This state of affairs is both illogical and unjust (*Victorson v. Bock Laundry Mach. Co., supra,* p 403).

The Court of Appeals has held that, in products liability cases, a cause of action accrues at the time of actual injury and not at the time the product was manufactured or sold, recognizing that "it is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one (*Mendel v. Pittsburgh Plate Glass Co.,* [25 NY2d 340] p 346)" (*Victorson v. Bock Laundry Mach. Co., supra,* p 403). If the plaintiff in such a case safely used the product for years, the Statute of Limitations would only begin to run, because of a defect, when the defect caused an injury. Analogously, when a person comes into physical contact with a defective or dangerous chemical or

drug, should not the measuring date for the Statute of Limitations be determined by when the substance actually has a deleterious effect on the body? As with any products liability case, is it not unthinkable, before plaintiff even has a cause of action, to time bar her from prosecuting a cause of action resulting from a mother's ingestion of DES?

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS

At a Special Term, Part I, of the Supreme Court of the State of New York, County of Queens, held at the courthouse, located at 88-11 Sutphin Boulevard, Jamaica, New York, on the 22nd day of January, 1982.

P R E S E N T :

Hon. EDWIN KASSOFF,
Justice

INDEX #2259/80

LINDA FLEISHMAN,

Plaintiff,

-against-

ELI LILLY AND COMPANY, E.R. SQUIBB & SONS, WINTHROP LABORATORIES and THE UPJOHN COMPANY,

Defendants.

The defendant, The Upjohn Company, having moved this court for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint in its entirety on the ground that all claims asserted by the plaintiff Linda Fleishman are barred by the applicable statute of limitations, and for such other and further relief as to the court seems just and proper; and the defendant, Eli Lilly and Company, having cross-moved for an order pursuant to CPLR 3211(a)(5), dismissing all claims against

Lilly on the ground that they were not commenced within the time permitted by law; and the defendant, E.R. Squibb & Sons, Inc., having cross-moved for an order pursuant to CPLR 3211(a)(5), action was not commenced within the time period permitted by law; and the defendant, Winthrop Laboratories, Inc., having cross-moved for an order pursuant to CPLR 3212, dismissing the complaint in its entirety on the ground that the action was not commenced within the time permitted by law,

NOW, on reading and filing the notice of motion of The Upjohn Company, dated June 9, 1981, and the affidavit in support thereof of Nancy Ledy Gurren, sworn to the 9th day of June, 1981, and upon the notice of cross-motion of the defendant Eli Lilly and Company, dated July 2, 1981, and the affidavit in support thereof of Colin W. Ewing, sworn to the 2nd day of July, 1981, and upon the notice of cross-motion of the defendant E.R. Squibb & Sons, Inc., dated July 7, 1981, and the affidavit in support thereof of Charles M. McCaghey, sworn to the 7th day of July, 1981; and upon the cross-motion of Winthrop Laboratories, Inc., dated July 9, 1981, and the affidavit in support thereof of Robert J. Woody, sworn to the 9th day of July, 1981; and upon the affidavit in opposition of the plaintiff, Linda Fleishman, sworn to the 10th day of September, 1981, and upon the reply affidavit of Nancy Ledy Gurren, sworn to the 23rd day of September, 1981, and upon all pleadings and proceedings heretofore had herein; and this matter having duly come before the court, and oral argument having been had thereon on September 25, 1981, and Julien, Schlesinger & Finz, by Leonard Finz, Esq., having appeared for plaintiff, Linda Fleishman; and Bower & Gardner, by Nancy Ledy Gurren, Esq., having appeared for the defendant, The Upjohn Company, and Dewey, Ballantine, Bushby, Palmer & Wood, by Sanford N. Berland, Esq., having appeared for the defendant, Eli Lilly and Company; and due

deliberation having been had thereon, and this court having issued its memorandum decision dated December 10, 1981,

NOW, on motion of Bower & Gardner, attorneys for the defendant, The Upjohn Company, it is now

ORDERED, that the motion of the defendant, The Upjohn Company, and the cross-motions of the defendants, Eli Lilly and Company, E.R. Squibb & Sons, Inc., and Winthrop Laboratories, Inc., are granted in their entirety; it is further

ORDERED, that all claims of the plaintiff, Linda Fleishman, are dismissed as time barred; and it is further

ORDERED, that the complaint, in its entirety, is dismissed with prejudice as against all defendants; and it is further

ORDERED, that the clerk is directed to enter judgment accordingly.

E N T E R,

s/ Edwin Kassoff

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS

SUPREME COURT : QUEENS COUNTY

SPECIAL TERM, PART 1

Index No. 2259/80

BY KASSOFF, J.

DATED December 10, 1981

LINDA FLEISHMAN

vs.

ELI LILLY AND COMPANY, et al.

In this action to recover for personal injuries, defendant The Upjohn Company moves for summary judgment on the ground that the action is barred by the statute of limitations. Defendants Eli Lilly and Company, E.R. Squibb & Sons and Winthrop Laboratories cross-move for similar relief.

Plaintiff asserts in her complaint that her mother in 1955 ingested diethylstilbestrol (hereinafter "DES") during her pregnancy with plaintiff and, as a result, she developed cancer in March, 1978. Seven causes of action are alleged against defendant manufacturers of the drug, sounding in negligence, breach of warranty, statutory violation, strict products liability, concerted actions by defendants leading to strict liability and enterprise liability, and breach of a continuing obligation to warn of the risks inherent in the use of DES.

Decision

Following discovery of her injuries, plaintiff commenced litigation against defendants in January and February of 1980. Defendants contend that the last possible date of ingestion of the drug took place on March 29, 1955, the date of plaintiff's birth, and thus, pursuant to the amendment of CPLR 208 and the addition of CPLR 105(j), the statute of limitations was tolled due to plaintiff's infancy for a period of three years following the attainment of majority, which effectively took place on September 1, 1974. Hence, it is argued that all causes of action were barred on September 1, 1977.

The issue before this court is when does a cause of action accrue for drug-related injuries which appear after an extended latency period.

In *Schwartz v. Heyden Newport Chemical Corp.*, (12 NY2d 212) a drug was injected into plaintiff's sinuses for the purpose of taking an X-ray in 1944. This substance allegedly produced a carcinoma requiring the removal of an eye in 1957. The Court of Appeals, in applying the holding of *Schmidt v. Merchants Despatch Transportation Co.* (270 NY 287), found that a cause of action accrues upon the violation of a legal right which, under the facts presented, was complete when the drug entered the body. A question was raised as to the existence of a cause of action prior to the establishment of all the elements of a negligence action, that is, injury and damages, but the court nevertheless relegated to the Legislature the responsibility of inquiring into the viability of a discovery rule and dismissed the action as time barred.

Again, in *Thornton v. Roosevelt Hospital*, (47 NY2d 780), the accrual of an action in strict products liability based upon the injection of a substance later causing cancer was found by the court to accrue "at the time of invasion of decedent's body,

and not at the time the decedent's cancerous condition became apparent." Most recently, in *Matter of Steinhardt v. Johns-Manville Corp.* and *Rosenberg v. Johns-Manville Corp.* (____NY2d____ [Oct. 29, 1981]), the principles of *Schmidt* and *Schwartz* were reaffirmed and the accrual of a cause of action for asbestos-related diseases was held to be on the date of invasion of the substance into the body. Any extension of the discovery provision of CPLR 214-a was reserved for the Legislature.

Although the inequities which befall a plaintiff who is left without a remedy prior to the knowlege of any injuries was discussed in the dissenting opinions of the leading cases noted above, the courts in this State have refused to extend the discovery doctrine of *Flanagan v. Mt. Eden General Hospital* (24 NY2d 427) beyond that of foreign objects.

The Court of Appeals' unwillingness to extend the discovery doctrine has been applied in other areas involving the statute of limitations. In the recent case of *Klein v. The City of Yonkers* (53 NY2d 1011 [June 19, 1981]), the court held that an action brought shortly after a damage-causing fire was barred by the statute of limitations, which required the commencement of the action within one year and 90 days of the issuance of the certificate of occupancy. The defendant municipality in this case in 1964 negligently issued a certificate of occupancy for a multiple dwelling equipped with defective and improper fire stops. Plaintiff bought the dwelling in 1969, relying on the certificate of occupancy. The premises was subsequently destroyed by fire in 1973. The court ruled that the period of limitations is measured not from 1973 but from 1964, when the "event" took place. Hence, a suit brought shortly after the injury was barred and had, in fact, become barred before there was any injury to bring the action for.

Decision

Finally, in the July, 1981 session of the Legislature, CPLR 214-a was amended, carving out the extension of the statute of limitations in the instance of a veteran exposed to phenoxy herbicides ("Agent Orange") during service in Indochina. A cause of action for injury or death caused by contact or exposure to "Agent Orange" can be commenced within two years from the date of discovery of the injury or within two years from the date in which the injury could, with reasonable diligence, have been discovered (CPLR 214-b).

This limited ameliorative provision, however, has no application to the tragic circumstances DES daughters now face. Without a statutory enactment, a DES daughter who is cognizant of the possibility of future injuries and timely institutes litigation will be denied a day in court in that the essential elements of injury and damages are lacking (*Rheingold v. E. R. Squibb & Sons.*, 74 Civ 3420 (SDNY, Oct. 8, 1975, Tenney, J.]), whereas a plaintiff who institutes litigation following discovery of her injuries may be barred by the statute of limitations. (*Fishler v. Eli Lilly & Co.* [New York County, Sept. 14, 1981, Index No. 15861/81, Gomez, J.]; *Samit v. Schlessinger* [New York County, Aug. 28, 1981, Index No. 17598/80, Maresca, J.]; *Marshall v. Schram* [Nassau County, June 4, 1981, Young, J.]; *Helmrich v. Eli Lilly & Co.* [Onondaga County, May 8, 1981, Tenney, J.]).

Contrary to the policy of New York courts, many federal and state courts have adopted a discovery rule for products liability injuries. (*Urie v. Thompson*, 337 US 163; *Toal v. United States*, 438 F2d 222; *Karjala v. Johns-Manville Prods. Corp.*, 523 F2d 155; *Diamond v. E. R. Squibb & Sons*, 397 So 2d 671 [Flor.]; *Lopez v. Swyer*, 62 NJ 267, 300 A2d 563.) Some courts have gone even further and applied an extended discovery rule. In these cases, a cause of action is said to accrue when awareness of the injury

and causal connection between the product and the injury is established. (*Goodman v. Mead Johnson & Co.*, 534 F2d 566; *Schenebeck v. Sterling Drug, Inc.*, 291 F Supp. 368, affd 423 F2d 919; *Ohler v. Tacoma Gen. Hosp.*, 92 Wash 2d 507, 598 P2d 1358; *Schiele v. Hobart Corp.*, 284 Or 483, 587 P2d 1010; *Gilbert v. Jones*, 523 SW2d 211 [Tenn.]; *Raymond v. Eli Lilly & Co.*, 117 NH 164, 271 A2d 170; Feigen, Statute of Limitations: The Special Problem of DES Suits, The American Journal of Law and Medicine, Vol. 7, No. 1.)

Despite the foregoing, the settled law of this State is set forth in *Thornton v. Roosevelt Hospital (supra).* Contrary to plaintiff's assertions, the New York cases cannot be distinguished by the factual difference that plaintiff's mother actually ingested the drug, and not the plaintiff. It is only through the mother's ingestion of the drug and its eventual absorption by the fetus that the plaintiff can claim damages against DES manufacturers.

Moreover, plaintiff's reliance on *American Pipe and Construction Co. v. Utah* (414 US 538) is also misplaced. The tolling of the statute of limitations for an individual due to the institution of a class action is unprecedented in this jurisdiction. (See *Fingland v. Levine,* 88 Misc 2d 1085, affd 54 AD2d 1096; *Snyder v. Hooker Chemicals & Plastics Corp.*, 104 Misc 2d 735.) Furthermore, the holding in *American Pipe* has been limited in the federal courts to those instances where denial of class certification was solely due to the failure to demonstrate that the class was so numerous that joinder of all parties was impracticable and where the purported members sought to intervene following denial of class status. (*Stull v. Bayard*, 561 F2d 429; *Arneil v. Ramsay*, 550 F2d 774.) The class actions previously commenced by DES daughters were denied certification for different reasons than in *American Pipe* and this plaintiff made no attempt to

subsequently intervene. (*Rheingold v. E. R. Squibb & Sons, supra; Boxer v. E. R. Squibb & Sons, Inc.* [New York County, April 27, 1979, Index No. 3838/76].)

Pursuant to CPLR 214(5), the statute of limitations for causes of action sounding in tort is three years from the date of the injury. In view of the foregoing case law, the last date of injury to plaintiff must be deemed to have occurred no later than her birth on March 29, 1955. Applying the tolling provisions, the causes of action in negligence, strict products liability, statutory violation, concerted action leading to strict liability and enterprise liability all expired on September 1, 1977, three years following her attainment of majority on September 1, 1974.

Similarly, notwithstanding the issue of whether a statutory cause of action for breach of warranty as provided for in UCC 2-725 actually exists under these facts (see *Martin v. Julius Dierck Equipment Co.*, 43 NY2d 583; *McCarthy v. Bristol Laboratories*, 61 AD2d 196), the four-year statute of limitations which runs from the date of sale (UCC 2-725; see *Reis v. Pfizer, Inc.*, 61 AD2d 777, affd. 48 NY2d 664) would have expired after the tolling period for infancy on September 1, 1977 as well.

Finally, as to the cause of action for breach of a manufacturer's continuing duty to warn of the risks of DES use and plaintiff's brief reference to fraudulent concealment of the facts, these contentions are insufficient to extend the statute of limitations. Although a manufacturer may have a duty to warn of known defects in its products (see *Donigi v. American Cyanamide Co.*, 57 AD2d 760, affd 43 NY2d 935), this duty will not toll the statute of limitations for a wrong which has already been committed. (*Holdridge v. Heyer-Schulte Corp. of Santa Barbara*, 440 F Supp 1088.) As stated in *Schwartz v. Heyden Newport Chemical Corp. (supra):*

Decision

> "[T]he bar of the Statute of Limitations cannot be avoided through an allegation that defendant had a continuing duty to warn plaintiff of the possible damaging consequences resulting from the act alleged to be negligent. Any duty that may arise to recall the product from the market has no bearing on the rights of those to whom it had been administered years previously." (P 216.)

Furthermore, there has been no evidence presented in opposition to the summary judgment motion which would even raise an issue of fact concerning equitable estoppel of the limitation period as a result of fraudulent concealment. (*Immediate v. St. John's Hospital*, 48 NY2d 671; see *General Stencils, Inc. v. Chiappa*, 18 NY2d 125; *Jordan v. Ford Motor Co.*, 73 AD2d 422.)

The traditional purpose of a statute of limitation is to insure the prompt assertion of claims and prevent the loss of evidence and failing memories of witnesses. As stated in the legislative findings to the recent amendment of CPLR 214:

> "It was never the intent of the legislature in imposing limitations, to foreclose the citizens of this state from prosecuting legitimate claims, provided such claims are diligently and expeditiously pursued. An exception to the general period of limitation rule is required when the pathological effect of an injury occurs without perceptible trauma, and the victim is blamelessly ignorant of the cause of the injury."

The Legislature has not seen fit to extend the privilege of CPLR 214-b to other innocent victims of unforeseen drug injuries, including those children subject to the devastating effects of DES.

Decision

As former Chief Justice Breitel, dissenting from the now overruled majority decision in *Mendel v. Pittsburgh Plate Glass Co.* (25 NY2d 340, 346-347) stated: "It is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one."

In the absence of legislative mandate, however, this court is constrained to grant summary judgment in favor of all defendants. Both the New York State Court of Appeals and the Legislature have not seen fit to agree with the views expressed by former Chief Justice Breitel and the plaintiff in the instant case. This court has no alternative but to grant defendants' motions.

Settle order.

s/ Edwin Kassoff
J.S.C.

JUDGMENT AND REMITTITUR OF COURT OF APPEALS OF NEW YORK

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

2 No. 301

Linda Fleishman,

Appellant,

v.

Eli Lilly and Company, et al.,

Respondents.

The appellant in the above entitled appeal appeared by Julien & Schlesinger, P.C.; the respondent(s) appeared by Russell H. Beatie, Jr., Esq.; Olwine, Connelly, Chase, O'Donnell & Weyher, Esqs.; Simpson, Thacher & Bartlett, Esqs., and Bower & Gardner, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. Judges Jasen, Jones, Wachtler and Simons concur. Chief Judge Cooke dissents and votes to reverse in an opinion. Judges Meyer and Kaye took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County, there to be proceeded upon according to law.

Judgment

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 12, 1984.

DECISION AND ORDER ON MOTION FOR REARGUMENT OF COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of September A.D. 1984

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

2 Mo. No. 792

Linda Fleischman,

Appellant,

vs.

Eli Lilly and Company, et al.,

Respondents.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements to respondent Upjohn. Judges Meyer and Kaye took no part.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

DECISION AND ORDER ON MOTION TO AMEND THE REMITTITUR OF COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of November A.D. 1984

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

2 Mo. No. 1059

Linda Fleishman,

Appellant,

vs.

Eli Lilly and Company, E.R. Squibb & Sons, Winthrop Laboratories and The Upjohn Company,

Respondents.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of the remittur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein, there was presented and necessarily passed upon a question under the

Constitution of the United States, viz: whether plaintiff was deprived of due process and equal protection of the laws by the holding that plaintiff's causes of action accrued and the Statute of Limitations commenced to run upon exposure to the harmful drug. (See 62 NY2d 888.)

AND the Supreme Court, Queens County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Judges Meyer and Kaye took no part.

s/ Donald M. Sheraw
Donald M. Sheraw, Clerk

JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

INDEX #2259/80

LINDA FLEISHMAN,

Plaintiff,

-against-

ELI LILLY AND COMPANY, E.R. SQUIBB & SONS, WINTHROP LABORATORIES and THE UPJOHN COMPANY,

Defendants.

Defendant, The Upjohn Company, having moved this court for an order pursuant to CPLR 3212, granting a summary judgment and dismissing the complaint in its entirety on the ground that all claims asserted by the plaintiff Linda Fleishman are barred by the applicable statute of limitations; and the defendant, Eli Lilly and Company, having cross-moved for an order pursuant to CPLR 3211(a)(5), dismissing all claims on the ground that they were not commenced within the time permitted by law; and the defendant, E. R. Squibb & Sons, Inc., having cross-moved for an order pursuant to CPLR 3211(a)(5), dismissing plaintiff's causes of actions on the ground that the action was not commenced within the time permitted by law; and the defendant, Winthrop Laboratories, Inc., having cross-moved for an order pursuant to CPLR 3212, dismissing the complaint in its entirety on the ground that the action was not commenced within the time permitted

Judgment

by law, and the Court having, by memorandum decision dated December 10, 1981, and by order entered January 22, 1982, granted defendants' motions and cross-motions to dismiss the complaint on the above stated grounds,

NOW, on motion of Bower & Gardner, attorneys for the defendant, The Upjohn Company, it is

ADJUDGED, that all claims of the plaintiff, Linda Fleishman, are dismissed as time barred; and it is further

ADJUDGED, that the complaint, in its entirety, is dismissed against the defendants, The Upjohn Company, Eli Lilly and Company, E. R. Squibb & Sons, Inc., and Winthrop Laboratories, Inc., with prejudice.

Judgment entered this 15th day of April, 1982.

s/ John J. Durante
Clerk

Filed
April 15, 1982
10:01 A.M.
Queens County Clerk.